No. 42144-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Mary Upton,

Appellant.

Clallam County Superior Court Cause No. 09-1-00356-3

The Honorable Judge S. Brooke Taylor

Appellant's Opening Brief

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2. The prosecution failed to prove beyond a reasonable doubt that Ms. Upton willfully failed or refused to immediately bring her vehicle to a stop.

3. The prosecution failed to prove beyond a reasonable doubt that Ms. Upton attempted to elude a pursuing police vehicle.

4. The prosecution failed to prove beyond a reasonable doubt that Ms. Upton drove in a reckless manner.

5. The trial judge commented on the evidence, in violation of Wash. Const. Article IV, Section 16.

6. The trial court erred by refusing to dismiss Count II (DUI).

7. The trial court erred by adopting Finding of Fact No. 2 (3.6 Ruling).

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13. The sentencing court erred by finding that Ms. Upton has the ability or likely future ability to pay his legal financial obligations.

14. The sentencing court erred by adopting Finding No. 2.5 (Judgment and Sentence).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To obtain a conviction for attempting to elude, the prosecution was required to prove, *inter alia,* that Ms. Upton willfully failed or refused to immediately stop her vehicle, that she attempted to elude a pursuing police vehicle, and that she drove in a reckless manner. The evidence showed that the police officer was eight cars behind Ms. Upton when he turned on his lights and/or siren, that she stopped after he pulled in behind her (within 30-45 seconds), and that in the interim she drove within the speed limit, did not drive through any red lights or stop signs, and crossed the white fog lines twice. Did the conviction for attempting to elude infringe Ms. Upton's Fourteenth Amendment right to due process because it was based on insufficient evidence?

2. A trial judge is absolutely prohibited from commenting on the evidence at trial, and any judicial comment is presumed to be prejudicial. In this case, the trial judge corrected the prosecutor's mischaracterization of the evidence on one occasion during closing, leaving the impression that he agreed with everything else the prosecutor said. Did the trial judge's comment on the evidence violate Ms. Upton's rights under Article IV, Section 16?

3. A police officer may not unreasonably interfere with a suspect's ability to gather probative evidence. In this case, Officer Larsen prevented Ms. Upton from obtaining an independent blood test. Did Officer Larsen violate Ms. Upton's Fourteenth Amendment right to due process?

4. A sentencing court may not find that an offender has the ability or likely future ability to pay legal financial obligations absent some support in the record for the finding. Here, sentencing court made such a finding in the absence of any evidence in the record. Was the sentencing court's finding clearly erroneous?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Mary Upton suffers from Type I diabetes, and must wear an insulin pump to maintain appropriate blood sugar levels. RP (3/14/11) 117-118; RP (3/15/11) 75-77.

In August of 2009, her friend Allison Seamands asked for her help moving items into storage, using Ms. Upton's large truck which was fitted with a canopy. RP (3/14/11) 104; RP (3/15/11) 78, 84. At Seamands's request, Ms. Upton brought vodka and made Seamands a drink; Ms. Upton tasted the drink before giving it to Seamands. RP (3/14/11) 106-107; RP (3/15/11) 79-81.

They worked together and put two loads of items into storage, when they both agreed that Ms. Upton needed to eat something. RP (3/14/11) 108-109; RP (3/15/11) 83. They went to a gas station and Ms. Upton ate some chicken. RP (3/14/11) 109; RP (3/15/11) 83. Then they went to WalMart to buy a lock for the storage unit. RP (3/14/11) 109. A couple noticed them and concluded they had been drinking, since they were laughing loudly and Ms. Upton was having trouble with her borrowed and ill-fitting flip-flops. RP (3/14/11) 91, 99, 110; RP (3/15/11) 83. The couple called the police as they saw the two women drive away. RP (3/14/11) 93, 101.

Officer Larsen was close by, and pulled in behind Ms. Upton at some distance. RP (3/14/11) 131-133. Seamands saw the police car, which was about eight cars behind them, and told Ms. Upton they were being pulled over. Ms. Upton didn't see the car at first and didn't believe she was being pulled over, since she was driving the speed limit. RP (3/14/11) 111, 121; RP (3/15/11) 38, 86. Both Seamands and Officer Larsen also noticed and confirmed that Ms. Upton was going the speed limit. RP (3/14/11) 113, 134; RP (3/15/11) 37.

While being followed by the officer with his lights on, Seamands said that Ms. Upton moved within her lane; Officer Larsen said that Ms. Upton swerved onto the side of the road three times; Ms. Upton said that Seamands pulled the steering wheel causing the truck to swerve two times. RP (3/14/11) 113, 122, 132-136; RP (3/15/11) 86. In any event, when Ms. Upton was stopped at a light, Seamands reached over and turned off the truck and pulled the keys from the ignition. RP (3/14/11) 114; RP (3/15/11) 86-87.

Officer Larsen spoke with Ms. Upton, eventually arresting her for Driving While Intoxicated and Attempting to Elude a Pursuing Police Vehicle. RP (3/14/11) 142; RP (3/15/11) 6, 22, 35; CP 20. She requested a blood draw, and Officer Larsen took her to the hospital to obtain one.

CP 17-18. A blood draw was not done, and Ms. Upton was booked into the jail. CP 18-19.

Ms. Upton moved to suppress the breath test refusal, arguing that she clearly and repeatedly requested a blood test. CP 17; Motion to Dismiss Count II (filed 10/13/09), Supp. CP. At the hearing, Officer Larsen testified that he took her to the hospital for a blood draw, and told her she had to pay for it herself.[1] RP (4/8/10) 14, 25-26. He further stated that she refused the blood draw, though he did not remember how she did that, and they left. RP (4/8/10) 5-27. The court ruled that Ms. Upton had refused the blood draw and denied the defense motion. RP (4/8/10) 49-52; CP 17-19.

The case was tried before a jury. During cross-examination regarding Ms. Upton's driving, Seamands said that Ms. Upton was not speeding, she stayed within her lane, and that there were no near-collisions. RP (3/14/11) 121-122. She also testified that Ms. Upton did not go through any stop lights or stop signs, and seemed sincere in her belief that she was not being pulled over. RP (3/14/11) 121-123.

Officer Larsen said that cars were braking and moving out of the way – either of Ms. Upton's driving or his lights and sirens. RP (3/14/11)

[1] He later told her that it would be covered by Medicaid. RP (4/8/10) 26; RP (3/15/11) 98.

136; RP (3/15/11) 39. He also told the jury that Ms. Upton did not go through any stop signs or stoplights. RP (3/15/11) 38.

After the state rested, the court denied the defense motion to dismiss the Attempting to Elude for insufficient evidence. RP (3/15/11) 71-73. Over defense objection, the court gave the jury a definition of "rash and heedless" based evidently on a dictionary definition:

> "Rash" manner means marked by or proceeding from undue haste or lack of deliberation or caution.
> "Heedless" manner means not taking heed. Heed means to pay attention or to give consideration or attention to.
> Instruction No. 9, Supp. CP.

During closing argument, the prosecutor sought to emphasize how long it took for Ms. Upton to pull over after Officer Larsen had turned on his lights. He sought to remain silent for 60 seconds, because according to him, that was the amount of time the officer followed her before she stopped. RP (3/15/11) 180. Ms. Upton objected: "counsel's misstating the testimony." RP (3/15/11) 180. The court, not ruling on the issue, stated: "It was 30 to 45 seconds, I believe." At which time, the prosecutor apparently had the jury note the passage of 45 seconds. RP (3/15/11) 180-181.

The jury voted guilty on both counts. RP (3/16/11) 4-6.

At sentencing, the court entered an order that included the finding that Ms. Upton "has the ability or likely future ability to pay the legal

financial obligations imposed herein." CP 8. This was done without any discussion. RP (5/18/11) 3-52. Ms. Upton timely appealed. CP 5.

ARGUMENT

I. MS. UPTON'S CONVICTION FOR ATTEMPTING TO ELUDE VIOLATED HER FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF THE OFFENSE.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009) .

B. The prosecution failed to prove beyond a reasonable doubt the elements of attempting to elude.

To obtain a conviction for attempting to elude, the prosecution was required to prove beyond a reasonable doubt that Ms. Upton willfully failed or refused to immediately stop her vehicle after having been given a signal to do so, that she attempted to elude a pursuing police vehicle, and that she drove in a reckless manner. RCW 46.61.024; Instructions Nos. 6-7, Supp. CP.

The prosecution failed to prove that Ms. Upton willfully failed or refused to stop her vehicle after being given a signal to do so. The evidence on this point was that the officer turned on his lights and siren when he was eight cars behind Ms. Upton's vehicle. RP (3/14/11) 111; RP (3/15/11) 38. She did not believe that he was signaling her, as she had not committed any infractions.[2] RP (3/14/11) 112, 122; RP (3/15/11) 86. When he caught up to her after 30-45 seconds, she was surprised when he turned off Highway 101, following her. RP (3/15/11) 115, 162. Her car came to a halt immediately thereafter. RP (3/15/11) 115.

Under these circumstances, it cannot be said that her failure to stop was "willful," since the undisputed evidence established that she believed the officer was not signaling her, and that she changed her mind only after turning off the main road. Furthermore, there was no testimony establishing that she could have safely stopped her vehicle on the highway during the 30-45 seconds it took the officer to pull in behind her.

Similarly, no evidence was presented suggesting Ms. Upton was actually attempting to elude the officer. She drove within the speed limit without violating any traffic laws (except for crossing the fog line twice.)

[2] This was confirmed by her passenger, who told Ms. Upton she thought the officer was pulling her over. RP (3/14/11) 111, 113, 121-123.

Without knowing he was signaling her specifically, her failure to pull over could not constitute an attempt to elude.

Finally, there is no evidence that she drove "in a reckless manner," which means driving in a rash or heedless manner, indifferent to the consequences. *State v. Roggenkamp*, 153 Wash.2d 614, 622, 106 P.3d 196 (2005). Even taking the evidence in a light most favorable to the prosecution, the evidence demonstrated, at most, that she was weaving within her own lane, and crossed the fog line twice. This is insufficient to show that she drove in a rash or heedless manner, indifferent to the consequences.[3]

Because the evidence was insufficient to prove the elements of attempting to elude, Ms. Upton's conviction violated her right to due process. *Engel, at* 576. The conviction must be reversed and the charge dismissed. *Smalis v. Pennsylvania,* 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

[3] The officer also testified that other drivers pulled off the road; however, he could not explain how he knew that they were responding to Ms. Upton's driving, rather than to his lights and siren. RP (3/14/11) 39.

II. THE TRIAL COURT IMPROPERLY COMMENTED ON THE EVIDENCE IN VIOLATION OF WASH. CONST. ARTICLE IV, SECTION 16.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *E.S., at* 702.

A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court "previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." *State v. Walsh,* 143 Wash.2d 1, 8, 17 P.3d 591 (2001).[4] An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

A comment on the evidence "invades a fundamental right" and may be challenged for the first time on review under RAP 2.5(a)(3). *State v. Becker*, 132 Wash.2d 54, 64, 935 P.2d 1321 (1997).

[4] The policy is designed to prevent appellate courts from wasting "judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits." *State v. WWJ Corp.,* 138 Wash.2d 595, 603, 980 P.2d 1257 (1999).

B. The trial judge improperly commented on the facts of the case during the prosecutor's closing argument.

Under Article IV, Section 16 of the Washington Constitution, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Wash. Const. Article IV, Section 16. A judicial comment is presumed prejudicial and is only harmless if the record affirmatively shows no prejudice could have resulted. *State v. Levy*, 156 Wash.2d 709, 725, 132 P.3d 1076 (2006). This is a higher standard than that normally applied to constitutional errors. *Id.*

In this case, the trial judge improperly commented on the evidence when defense counsel objected to an error during the prosecutor's closing. RP (3/15/11) 180. By correcting the prosecutor's misstatement on this one occasion, the trial judge left the jury with the impression that he agreed with the remainder of the prosecutor's argument. RP (3/15/11) 178-190, 203-205.

The error is presumed prejudicial, unless the record affirmatively shows that no prejudice resulted. *Levy, at* 725. The record is devoid of any affirmative indication that the error was harmless under the *Levy* test. Accordingly, Ms. Upton's convictions must be reversed and the case remanded for a new trial. *Id.*

III. MS. UPTON'S DUI CONVICTION VIOLATED HER FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE POLICE DEPRIVED HER OF A REASONABLE OPPORTUNITY TO OBTAIN HER OWN BLOOD TEST.

A. Standard of Review

Constitutional issues are reviewed *de novo*. *E.S., at* 702. A trial court's factual findings are reviewed for substantial evidence; conclusions of law are reviewed *de novo*. *State v. Gatewood*, 163 Wash.2d 534, 539, 182 P.3d 426 (2008). Conclusions of law erroneously denominated as findings of fact are subject to de novo review. *In re Tragopan Properties*, LLC, ___ Wash.App. ___, ___, 263 P.3d 613 (2011). Mixed questions of law and fact are reviewed *de novo*. *See, e.g., State v. Martinez*, 161 Wash.App. 436, 441, 253 P.3d 445 (2011) (addressing ineffective assistance claim).

B. The government is constitutionally prohibited from interfering with an accused person's right to gather probative evidence.

An accused person has a due process right to gather evidence in her or his own defense. *State v. McNichols*, 128 Wash.2d 242, 251, 906 P.2d 329 (1995) (citing *California v. Trombetta,* 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)). This includes the right to an independent blood test, where blood alcohol content is at issue.[5] *City of*

[5] This right is also secured by statute. *See* RCW 46.20.308; RCW 46.61.506.

Blaine v. Suess, 93 Wash.2d 722, 727, 612 P.2d 789 (1980). An indigent person arrested for DUI is constitutionally entitled to an independent blood test at public expense.[6] U.S. Const. Amend. VI; U.S. Const. Amend. XIV; *see State v. Punsalan*, 156 Wash.2d 875, 878, 133 P.3d 934 (2006); *State v. Bartels,* 112 Wash.2d 882, 887-888, 774 P.2d 1183 (1989). The constitutional right is implemented by CrR 3.1(f). *Id*

The question of whether police afforded an accused person a "reasonable opportunity" to gather evidence depends heavily on the particular circumstances. *Blaine, at* 727. A person in police custody has no realistic opportunity to obtain a blood test except by communicating a request to the authorities. *Id.* Where police unreasonably interfere with the accused person's efforts "to procure probative evidence," the error cannot be remedied by a new trial. Accordingly, under such circumstances, the charge must be dismissed with prejudice. *Id, at* 728.

C. Officer Larsen unreasonably interfered with Ms. Upton's efforts to obtain an independent blood test.

Whether a person's words and conduct amount to an assertion of the right to an independent blood test is properly characterized as a mixed question of law and fact. The same is true of a purported refusal to take

[6] The right is also implemented by CrR 3.1(f), which implements the constitutional requirement.

such a test. *See, e.g., Sanders v. State*, 169 Wash.2d 827, 849, 240 P.3d 120 (2010) ("The determination of waiver is a mixed question of law and fact"); *State v. Harrington*, 167 Wash.2d 656, 662, 222 P.3d 92 (2009) ("Whether police have seized a person is a mixed question of law and fact"); *State v. Easterlin*, 159 Wash.2d 203, 212, 149 P.3d 366 (2006) ("'Whether a person is armed is a mixed question of law and fact.'")

In this case, Ms. Upton repeatedly asserted her right to an independent blood test. CP 17-18. Although Officer Larsen transported Ms. Upton to the hospital, he did not allow her to remain there long enough to be checked in and seen by medical personal; instead, he removed her from the hospital before any of her information was even entered into the hospital system.[7] RP (4/8/10) 29-37. At some point, he erroneously told her that she would have to pay for any blood test herself.[8] RP (4/8/10) 25. And although he claimed that she "refused" a blood test, he was unable to recall specifically what she had done or said that made him conclude she was refusing.[9] RP (4/8/10) 24. The prosecution did not

[7] According to records, he was back in his patrol car with Ms. Upton only 23 minutes after his car arrived at the hospital. RP (4/8/11) 28.

[8] At some point, he allegedly told her it would be covered by Medicaid. This was also misinformation: the funds would be provided pursuant to CrR 3.1(f), rather than through Medicaid. *Bartels, supra.*

present any witnesses from the hospital to confirm that she had refused a blood test. Ms. Upton denied ever having refused the test—a test which she herself had repeatedly demanded.[10] RP (4/8/10) 39-40.

Nor can a "refusal" be presumed from her behavior at the hospital. Larsen testified that Ms. Upton was emotional but coherent while at the hospital. RP (4/8/10) 16-18. He agreed that hospital staff "spoke with" her; he did not say that they tried to speak with her or were unable to speak with her. RP (4/8/10) 23. During the pretrial hearing, he never testified that she was belligerent or uncooperative.[11] RP (4/8/10) 5-28. Nor did he ever testify that she was incoherent.[12] In fact, at trial, he specifically testified that she was not incoherent at any time. RP (3/14/11) 52. Accordingly, Findings of Fact Nos. 2 and 10 are not supported by the evidence, and must be vacated. CP 17-18.

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[9] His testimony on this point was that "[s]he ultimately refused the blood test, said she was not going to do it;" however, when he was asked "how did she communicate to you that she no longer wanted a blood test?" he referred to his report, where he'd written only that she'd "refused" the blood test. RP (4/8/10) 23-24.

[10] This was in contrast to his testimony regarding her refusal to take the breath test; in that instance, he was able to quote her exactly. RP (4/8/10) 13.

[11] At trial, he did testify she was belligerent and uncooperative when she refused to get out of his patrol car. RP (3/14/11) 43. He never testified that she was belligerent or uncooperative while at the hospital. *See* RP *generally*.

[12] When asked if she was "unable to speak or incoherent," he replied "No, she could speak and she was – she could speak." RP (4/8/10) 18.

The trial court's legal conclusion—that Ms. Upton "refused" the blood test— is likewise erroneous.[13] *See* CP 19. There are no underlying facts in the record—or in the court's findings—from which a refusal can be inferred. Instead, the only evidence of a refusal was Officer Larsen's conclusion that she had refused; but Larsen could not remember the basis for that conclusion.[14] RP (4/8/10) 24.

Under these circumstances, the evidence was insufficient to support the trial court's legal conclusion that Ms. Upton refused to submit to the blood test she had repeatedly demanded. Accordingly, her conviction for DUI must be reversed and the case dismissed with prejudice. *Blaine, at* 728.

IV. THE SENTENCING COURT'S FINDING REGARDING MS. UPTON'S PRESENT OR FUTURE ABILITY TO PAY HIS LEGAL FINANCIAL OBLIGATIONS IS NOT SUPPORTED BY THE RECORD.

Absent adequate support in the record, a sentencing court may not enter a finding that an offender has the ability or likely future ability to pay legal financial obligations. *State v. Bertrand,* ___ Wash.App. ___, ___, ___ P.3d ___ (2011). In this case, the sentencing court entered such a

[13] The court erroneously characterized this conclusion as a finding of fact. CP 18-19. It is more properly characterized either as a conclusion of law, or as a mixed question of law and fact. *See Sanders, supra; Harrington, supra; Easterlin, supra.*

[14] He speculated that it probably involved foul language. RP (4/8/10) 24.

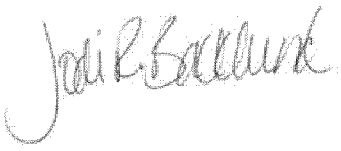
finding without any support in the record. CP 8. Indeed, the record suggests that Ms. Upton's disability would prevent her from paying any amount imposed. RP (4/26/11) 11-15; RP (5/18/11) 28-34. Accordingly, Finding No. 2.5 of the Judgment and Sentence must be vacated. *Id.*

CONCLUSION

For the foregoing reasons, the charges must be dismissed with prejudice. In the alternative, the convictions must be reversed and the case remanded for a new trial. If the convictions are not reversed, Finding No. 2.5 in the Judgment and Sentence (regarding Ms. Upton's current or future ability to pay her legal financial obligations) must be vacated.

Respectfully submitted,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

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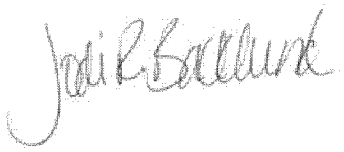
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 23, 2011.



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